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IN THE

Supreme Court of the United States

October Term, 1949.

No. 708

UNITED STATES OF AMERICA,

v.

5 cases, more or less, each contaning 6 cans of an article labeled in part: (can) "Figlia Mia Brand a blend consisting of 90% vegetable oils, choice cottonseed, corn and peanut oils, plus 10% pure olive oil one gallon net" and 5 cases, more or less, each containing 6 cans of an article labeled in part: (can) "Pace O Mio Dio Brand 80% choice peanut oil and 20% pure olive oil one gallon net."

ANTONIO CORRAO CORPORATION,
Petitioner-Claimant.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit and Brief in Support Thereof.

CHESTER A. LESSLER,
Attorney for Petitioner-Claimant.

JULIUS ZIZMOR,
Of Counsel.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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ANTONIO CORRAO CORPORATION,
Petitioner-Claimant.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Judges of the Supreme Court of the United States:

Petitioner, Antonio Corrao Corporation, also referred to herein as the "claimant", respectfully prays for a writ of certiorari to review

(1) a judgment (R. 254) of the United States Court of Appeals for the Second Circuit, entered January 10, 1950, which affirmed (a) a decree of the United States District Court for the District of

Connecticut, condemning certain goods belonging to petitioner; (b) an order denying it the right to discovery and inspection (R. 19-21);

(2) an order of the United States Court of Appeals for the Second Circuit entered January 30, 1950, denying petitioner's application to remand this cause to the District Court for a new trial and alternative relief (R. 255 to 265).

Summary Statement of the Matter Involved.

Claimant is a blender and packer of edible oils consisting of vegetable, peanut and olive oils. These oils are sold under two brand names—(1) Pace O Mio Dio; (2) Figlia Mia, and contain 20% and 10% olive oil respectively.

In the five informations filed July 14, 1948, it is charged that in June 1948, claimant shipped in interstate commerce Pace and Figlia Mia Brand oil, which was adulterated and misbranded within the meaning of Federal Pure Food, Drug & Cosmetic Act, Section 342 (b), (1), (4), in that (1) the oil contained little, if any olive oil, and (2) artificial flavoring had been added thereto in order to simulate olive oil, and consequently the labels on the respective cans stating that they contained 20% and 10% olive oil, respectively, were false and misleading (R. 4, 5).

On January 26, 1949, the Government amended the informations by alleging that the goods were adulterated in that:

> "squalene* had been added thereto * * * so as to make said article appear of greater value than it is, namely, to be an article containing more olive oil than it actually contains" (R. 8).

*I. Squalene is a hydrocarbon found in edible oils, but to a greater degree in olive oil. It is colorless, odorless and tasteless. Squalene is also found in shark liver oil. However, there is no means of distinguishment (chemically or otherwise) between olive oil squalene and shark liver squalene, inasmuch as both are hydrocarbons, identical in composition (R. 39, 40).

The Trial and the Jury's Verdict.

Petitioner, whose goods the Government sought to forfeit, was excluded from the courtroom and denied the elementary right of being present at the trial, hearing its accusers and defending itself. Petitioner's counsel was even denied the right to make an opening statement to the jury in its behalf. At this trial conducted in *absentia*, petitioner was unable to properly defend itself—and in the uneven struggle which ensued, petitioner was vanquished and its property condemned to destruction when the jury after hearing the Court declare that the Government's case was based *solely* upon inference (R. 172), found that petitioner's goods were adulterated and misbranded as charged (R. 26, 29).

We shall also show among other things, that on the trial, the Government suppressed vital testimony in its possession, which, if produced, undoubtedly would have resulted in a verdict favorable to petitioner.

The Government's Proof.

Since petitioner urges as one of the grounds for review that the Government wholly failed to prove the charge of adulteration or misbranding, it is necessary to summarize the testimony and show its utter inadequacy.

The Government (through witnesses Dolke, Bassen, Geller and Ledder), was permitted to offer proof wholly unrelated to, or connected with the claimant, with the result that much prejudicial and incompetent testimony was presented to the jury. If this testimony is eliminated, then admittedly the Government failed to make out a case and the proceedings should have been dismissed.

(a) Dolke is employed by Distillation Products Co. of Rochester (hereinafter referred to as "Distillation"). He testified over claimant's objection (R. 71 to 75), that between 1945 and 1947, his employer extracted squalene

from shark liver oil, which was sold to a Mr. Memmoli of the Loumen Drug Co. and a Mr. Geller of Circle Mop & Brush Co. (pp. 71, 72, 73). That Distillation was instructed by the Food and Drug Administration to notify it of any sales of squalene made to any one (p. 74). No proof was offered at the trial that claimant had any connection with Memmoli,* Loumen Drug Co., Geller, Circle Mop & Brush Co. or that claimant at any time purchased or obtained squalene from any one (R. 155 to 159).**

(b) Bassen, a Food and Drug inspector testified that approximately one year prior to the shipment of the goods involved herein, namely in July, September and October 1947, he went to Distillation at Rochester and added anthranilic acid to squalene (R. 76) and that the cans containing the squalene were stencilled "Circle Mop & Brush Co." (R. 77).

(c) Geller testified that in 1946, Memmoli asked him to obtain squalene from Distillation; that he obtained 300 gallons and delivered it to Memmoli (R. 85-87).

(d) Finally, Ledder, a Food and Drug inspector testified that in October 1947 he saw a shipment of goods labeled "squalene fractions" at a freight terminal addressed to Circle Mop & Brush Co. and that the goods were delivered to Geller (R. 93-95). The testimony of each of the foregoing witnesses was received over claimant's objections and motions to strike out such testimony were denied (R. 79, 80, 84, 85-87, 93, 94, 137, 138).

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*Memmoli and Antonio Corrao, president of the claimant, are members of the same Masonic Lodge.

**The testimony is uncontradicted that claimant at no time purchased squalene, artificial flavoring or adulterant of any kind (R. 157), and similarly claimant's blender testified without contradiction that he put 20% olive oil in the Pace brand and 10% olive oil in the Figlia Mia brand, and that at no time did he add squalene or artificial flavoring thereto (R. 155, 156).

(e) The Government then called Memmoli as a witness, seeking to prove that he sold squalene to the claimant. This would be the link connecting the testimony of the previous witnesses with the claimant. However, *before* being called to the stand, Memmoli's attorney advised the U. S. Attorney that Memmoli would refuse to answer any questions put to him on constitutional grounds, since he was under indictment therefor in the U. S. District Court* (R. 261). Notwithstanding the foregoing, the Government with utter guile and for the purpose of creating an atmosphere of prejudice against claimant, put Memmoli on the stand and he immediately disclosed to the jury that he was under indictment for allegedly selling squalene to claimant and would refuse to answer any questions. The Government's attorney then asked him a series of questions inquiring whether he had ever sold or delivered squalene to claimant, and in each instance he refused to answer on the ground that it might incriminate him (R. 88-92).

Claimant moved for a mistrial by reason of the foregoing prejudicial conduct, but the motion was denied (R. 92). The Government's attorney, seeking to make further capital out of the foregoing impropriety, was permitted on summation to comment on the refusal of his own witness to testify and asked the Jury to draw an inference unfavorable to petitioner therefrom (R. 163, 164).

Thus, none of the testimony of Dolke, Bassen, Geller or Ledder was connected to the claimant, and hence all testimony concerning the alleged addition of anthranilic acid to squalene (a charge not contained in the pleadings) or the sale of such squalene by Distillation one year or more prior to the offense charged herein, to third persons who concededly had no connection with the claimant, was improperly received.

Indeed, the trial Court was dubious concerning the propriety of this testimony, for it addressed the United States attorney as follows (R. 109):

*Memmoli was subsequently acquitted of the foregoing charge (R. 261).

"do you still claim it is going to be possible to trace those shipments through to the claimant?"

The attorney refused to answer the question directly, *but no proof was offered by the Government tying in any of these shipments* (squalene) *to the claimant.*

The Government's entire case is founded upon the testimony of the witnesses already mentioned herein, and since their testimony is not connected to, or linked with the claimant, the testimony of the Government's chemist (Dr. Fitelson) who *subsequently* testified, must also be disregarded, because his conclusion that claimant's oil did not contain the stated percentage of olive oil, is based *solely* on the erroneous assumption and inference (without any supporting proof whatever) that squalene containing anthranilic acid emanating in Rochester in 1947, was added to and found in claimant's oil in June 1948, one year later.

Government's Proof Concerning the Olive Oil Content of the Oil.

(1) Weber and Kirsten, Government employees (R. 40, 50) made a chemical analysis of the official samples collected herein. Their analysis was limited to sorting tests, to determine the different types of oils contained in claimant's blends. In order to ascertain the presence of olive oil, Weber and Kirsten ran a squalene test and the results obtained are as follows (R. 41 to 46, 51, 52, 87):

Figlia Mia (10% olive oil) showed a squalene content ranging from a low of 46 to a high of 52, whereas Pace (20% olive oil) ranged from 86 to 91.

(2) Jablonski, a Government analyst (R. 35) was permitted over claimant's objection to testify (R. 56) that he found anthranilic acid in claimant's oil and recognized it through a *red color* which he created in the oil by add-

ing phenol thereto* (R. 56-58, 59-61, 63-68). Claimant was not prepared to, and indeed unable to defend itself on the trial against this *new* charge not contained in the pleadings. It was taken by surprise.

It is significant to note that subsequent to the trial herein, claimant was indicted for allegedly adulterating and misbranding the oil involved in this case and at the criminal trial held in June 1949, Jablonski admitted that he was *told* by Dr. Fitelson to state that the alleged red color was a coal tar derivative (anthranilic acid) (R. 260). Moreover, Jablonski conceded that the same red color could be produced by many substances other than anthranilic acid (R. 261), yet Jablonski failed to disclose these facts during the trial at bar (R. 261).

No proof was offered that the coal tar derivative (red color) allegedly found by Jablonski in claimant's oil was the *SAME ANTHRANILIC ACID* placed in squalene in Distillation's premises in 1947, one year before.

(3) Dr. Fitelson is the chief food chemist of the Food and Drug Administration in New York City (R. 35). He falsely testified (see pp. 23, 24, this petition) that the amount of squalene found in a blend of oil is the index by which the percentage of olive oil therein contained may be measured and determined (R. 115).**

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*Anthranilic acid consists of white powder crystals, and is not a red color (R. 105). Moreover it is well known that color is a *generic test* and cannot identify any *specific* substance.

**There is no accurate method of determining the percentage of olive oil in a given blend. The squalene test is said to be the best test, but it has many serious limitations. The squalene content of olive oil produced in different countries varies from a low of 136 to a high of 708 milligrams in 100 grams of oil. If the olive oil tested emanates from a country where the squalene content is 136 milligrams, a 20% blend of olive oil would require the presence of 27.2 milligrams of squalene. If the oil was produced in a country where the squalene content was 200 milligrams, a blend containing 20% olive oil would require the presence of 40 milligrams of squalene. Since the Government's chemists do not know the country of origin of the oil they test, they use an *arbitrary average figure* of 383 milligrams of squalene for testing purposes. Consequently, by this *arbitrary average figure* 20% olive oil must show at least 76.6 milligrams of squalene, whereas a 10% olive oil must show a squalene content of 38.3 (R. 114 to 117).

He admitted that based upon the foregoing test, claimant's Pace blend contained 20% olive oil, whereas the Figlia Mia brand contained 10% olive oil, exactly as stated on the respective labels (R. 117, 118).

Fitelson stated *that he did not make any tests* on the official samples herein, except that he tasted and smelled them* (R. 96). Notwithstanding the foregoing, he was permitted to "interpret" the tests made by Kirsten, Weber and Jablonski, the "interpretation" consisting of his conclusion that claimant's oil contained one or two percent. olive oil (R. 97-101), and that squalene had been added thereto because, allegedly, anthranilic acid was found in claimant's oil (R. 104, 105).**

On cross-examination however he was compelled to admit that there is no method by which it may be determined whether squalene has been added, since squalene whether emanating from shark liver oil or olive oil, is a hydrocarbon and there is no means of differentiating between the two (R. 39, 40, 116).

The foregoing should demolish Fitelson's "interpretations" and conclusions as well as the Government's entire case. They are based *solely* upon the assumption that squalene has been added to claimant's oil, and since such theory admittedly is impossible of proof, Fitelson's "interpretations" and the Government's case fall completely.

Fitelson Admits That the Tests Employed Herein Are Inaccurate, Erroneous and Incapable of Determining the Amount of Olive Oil in the Blends.

Petitioner called the attention of the Court below to the fact that Fitelson at the criminal trial (held four months

*The smell and taste test is frowned upon by the Courts because of its utter inaccuracy. *U. S.* v. *Commercial Creamery Co.*, 43 Fed. Sup. 714, 718. Fitelson also admitted that the test was neither a valid nor a quantitative test. (R. 259).

**Anthranilic acid is a white flake powder without odor or flavor, but no such powder was found in, or extracted from claimant's oil (R. 105)).

after the trial at bar), conceded that none of the tests performed by Weber and Kirsten or any of the Government witnesses, could accurately determine the amount of olive oil in claimant's blends and that the squalene test was utterly inaccurate (R. 257, 258, 259). The court below either overlooked or ignored this changed testimony for the opinion below states (R. 248):

> "The squalene content of blended oil is the universally accepted criterion of the amount of olive oil present in a blend. However, squalene is also found in shark liver oil and it is impossible to distinguish one squalene from the other. Consequently by adding shark liver squalene to peanut oil a blend can be produced which will appear to octain 10% or 20% of olive oil although in fact it contains little or none."

Yet at the criminal trial Fitelson stated that where the squalene content is 32 or over the squalene test is worthless; specifically he said:

> "In connection with a case such as this one where the squalene is over 32, *it does not tell you anything*" (R. 258).

At bar, the squalene content of claimant's 20% olive oil (Pace) was 94, whereas the 10% blend (Figlia Mia) was 51 (R. 41 to 46, 51, 52, 87). Plainly, therefor there was no basis for the claim that claimant's oil did not contain the stated percentage of olive oil. Moreover, Fitelson admitted that every test performed herein by the Government chemists was inaccurate and inadequate and subject to error, and that he was unable to isolate a single squalene in claimant's oil that contained anthranilic acid (R. 259).

Dr. Fitelson as well as the other chemists who testified for the Government failed to disclose to the jury at bar these damning admissions (R. 259), and thus we have a situation where the Government by means of a scurvy trick, has succeeded in condemning claimant's goods on the representation that its experts employed a proper test to determine the amount of olive oil in the blends when concededly the test was worthless and utterly inaccurate. Small wonder then that at the criminal trial claimant was acquitted of the charge that the oil did not contain the stated amount of olive oil (R. 260).

Jurisdiction.

The judgment and order of the Court of Appeals were entered on January 10th and 30th, 1950, respectively (R. 254). The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by title 28 U. S. Code, Section 1254.

Questions Presented.

1. Was it error and a violation of due process (U. S. Constitution, Amend. 5)

   (a) to exclude Antonio Corrao, president, sole stockholder and person charged with the management of petitioner's affairs, from the courtroom during the entire trial of this proceeding, and thus deny it the right to hear its accusers, consult with counsel and properly defend itself?

   (b) to deny petitioner's counsel the right to make an opening statement to the jury and outline its defense?

2. Was it reversible error for the Government to call as a witness, one Memmoli (whom it charged supplied petitioner with squalene) and ask him a series of questions

that were prejudicial to petitioner, namely among others, did he sell or furnish it with squalene, knowing in advance that the witness would refuse to answer on the ground that he was under indictment therefor and his testimony might incriminate him. More, was it error for the Government's attorney to comment to the jury thereon, and ask it to draw an inference unfavorable to petitioner because Memmoli, his own witness, refused to testify?

3. Was the decree of condemnation entered herein based upon competent testimony, and in any event was it proper for the Court below to refuse to dismiss the libels or remand the case to the District Court for a new trial when it was shown that the Government wilfully suppressed and concealed from the Jury the fact that all the tests employed by its witnesses, were inaccurate and inadequate and hence there is no valid proof to support the decree? *Tilghman* v. *Hunter,* 167 Fed. (2) 661.

4. Where the Government bases its claim of adulteration and misbranding upon a secret and unpublished test, was it proper to deny petitioner the right to discovery and inspection, thereby precluding petitioner from adequately defending itself against the secret charge?

5. Was it proper to condemn the five shipments involved herein when there was no proof that the single sample taken from each shipment was representative of the whole of such shipment?

Reasons for Granting the Writ.

We submit that the Court below decided substantial questions in a manner not in accord with the applicable decisions of this Court.

We urge:

(1) That the questions involved herein have been decided erroneously by the Court below, are substantial, of general importance and petitioner has been deprived of its property without due process of law.

(2) Questions 1, 2 and 5 have never been presented to or passed upon by this Court. The right of a corporation to be present in Court and hear its accusers when the Government seeks to forfeit its property, involves a substantial question of due process and the ruling thereon made below, conflicts with the decisions in *District of Columbia* v. *Flagg,* 42 App. D. C. 73, and cases therein cited; and *Sherman* v. *Irving Mdse. Co.,* 26 N. Y. S. (2d) 645.

(3) It is of the utmost importance that this Court pass on the question: may the Government call as a witness against the defendant, one (Memmoli) allegedly connected with the challenged transaction and under indictment therefor, knowing that he will refuse to testify on constitutional grounds? This question constantly occurs and involves the proper administration of justice in our Courts and the decision below (a) conflicts with legal precedent cited on pages 17 to 20, this petition and (b) in effect admits it was error to call Memmoli as a witness (R. 254).

The Opinion Below.

No opinion was written by the District Court in entering the decree of condemnation. The opinion of the Court of Appeals appears at R. 247-253 and has not been officially reported as yet.

WHEREFORE petitioner prays that a writ of certiorari issue herein.

ANTONIO CORRAO CORPORATION,
By CHESTER A. LESSLER,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The major portion of the facts have already been set forth in the petition herein and restatement here is omitted in the interest of brevity. Certain additional facts are set forth in the argument which follows:

Argument.

I.

It was error and a denial of due process to exclude claimant from the courtroom during the entire trial, and to refuse its counsel the right to make an opening statement to the jury in its behalf.

A.

The claimant herein is Antonio Corrao Corporation. Antonio Corrao, is its president, sole stockholder and verified the answer in its behalf (R. 15). He is in *sole* charge of its affairs and is personally familiar with the facts herein. Claimant was entitled to be present at the trial of this proceeding and defend itself against the charges made by the Government. A corporation is an artificial being and exists only in contemplation of law. *It may act and be present only through an officer who represents it.* The president of a corporation is charged with its management and the direction of its affairs.

After the jury had been impanelled, claimant's counsel requested that witnesses be excluded during the trial of the proceeding, whereupon the U. S. Attorney objected and stated that claimant's counsel

"is apparently adopting New York style now" (R. 32).

Claimant's counsel immediately moved for a mistrial but the motion was denied. The Court however granted the motion to exclude witnesses (R. 32, 33).

The U. S. Attorney then demanded that Mr. Corrao, president of the claimant corporation, be excluded from the courtroom during the trial because the Government had subpoenaed him as a witness (R. 33).* Claimant's counsel objected to the attempt to bar Mr. Corrao, on the ground that the rule as to exclusion of witnesses does not apply to a party to the action, and since the corporation may be present in Court only through an officer, excluding the president charged with the management of its affairs, was in effect excluding the party; that this would prejudice claimant's right of defense; was a denial of due process and that counsel needed Mr. Corrao's presence in Court in order to consult as the testimony was adduced (R. 34). The objection was overruled and Mr. Corrao was excluded from the Courtroom during the entire three days of the trial (R. 34, 35).

Claimant's counsel found it impossible to properly defend claimant by reason of the fact that he was without his client and hence unable to consult with it in Court as the trial proceeded. Repeated requests made during the course of the trial to have Mr. Corrao present in the Courtroom were overruled (R. 46, 47, 50, 66, 67, 70).

The rule as to excluding witnesses during a trial, does not apply to a party who has a right to be present at all times. *Leed* v. *Robert Joshua Ltd.* 72 N. Y. S. (2d) 3, and cases therein cited. In *District of Columbia* v. *Flagg,* 42 App. D. C. 73 at 76, the representative of a corporation was excluded during the course of the trial. In holding that such exclusion was error, the Court said:

*Actually, Mr. Corrao was not subpoenaed as a witness, but instead the subpoena was served on petitioner directing it (through its president, Mr. Corrao) to produce its books and records.

> "It is always improper to exclude a litigant, and we think the same rule should apply to the representative of a corporation. *Heatin* v. *Dennis,* 103 Tenn. 155, 52 S. W. 175; *Lenoir Car Co.* v. *Smith,* 100 Tenn. 127, 42 S. W. 879; *Cattrell* v. *Cattrell,* 81 Ind. 87."

In *Sherman* v. *Irving Merchandise Co.,* 26 N. Y. S. (2d) 645, the Court in reversing a judgment because the president of the corporation had been excluded from the Courtroom, declared:

> "The exclusion from the Court room of the president of the defendant corporation who hired and had supervision of the plaintiff as its employee and who must be regarded as under the duty of looking after the corporation's interest, at the trial, was prejudicial error."

The same rule was followed in *Hughes* v. *State,* 126 Tenn. 40, 88, at 89 and cases therein cited.

In its opinion (R. 250) the Court below erroneously states that the trial Court in effect granted the motion to exclude witnesses on condition that Mr. Corrao be excluded. No such condition was attached, and moreover, such a condition would have been improper in any event since it deprived petitioner of the right to be present at the trial and hear its accusers. Finally, the Court below argues that (R. 250) that Mr. Corrao, not petitioner was barred from the Courtroom. Such refined distinction ignores reality, namely that Mr. Corrao is the corporation; he manages its affairs and owns all of its capital stock. A corporation may be present only through an officer charged with the administration of its affairs; exclude him (Corrao) and the corporation's presence is mythical, non-existent, a fiction.

It is common knowledge that most businesses are "one man" corporations, wherein a single individual is its president, sole stockholder and guides its affairs and destiny. If the ruling pronounced by the Court below is valid, it means that thousands of small business corporations operated as aforesaid, will be reduced to an inferior or second class status in a Courtroom by being subjected to the possibility of exclusion if the opposing side subpoenas its president as a witness. This is a violation of due process as guaranteed by our Constitution. *Fillippon* v. *Albin Vein Slate Co.,* 250 U. S. 76, 81; *Arrington* v. *Robinson,* 114 Fed. (2) 821.

B.

After the jury had been impanelled, the U. S. Attorney stated that he would not make an opening statement to the jury. Claimant's counsel however requested that he be permitted to make an opening statement on behalf of the claimant. The request was overruled (R. 31, 32). We submit this was error.

In every case tried to a jury, the parties have the right to make an opening statement in order that their case may be properly presented to the jurors who are the triers of the facts. Denial of such a basic right is prejudice *per se. Curtis* v. *People,* 211 P. 381; *People* v. *McDowell,* 284 Ill. 504. The right to make an opening statement is so vital and fundamental that none can measure the extent of the harm that results from a violation thereof. The denial of such right deprived petitioner of the opportunity to adequately present its case to the jury. The argument by the court below (R. 250) that an opening statement was superfluous because the issues were simple (actually they were involved and required a thorough knowledge of chemistry) and the trial Court in selecting a jury had advised the jury what the pleadings contained, merits little answer. The Court's comments on the *voir dire* concerning the nature of the case (as contained in

the pleadings) are its own. A party has the right through counsel to make an opening factual statement to the jury and explain the nature of the case, its theory of defense and what it intends to prove. The foregoing concededly are not the province of the trial judge and he may not deprive petitioner of this fundamental right under the pretext that the issues are too simple. *Fareira* v. *Smith,* 22 N. Y. S. 939; 3 Misc. Rep. 255.

II.

It was reversible error for the Government to call Memmoli as a witness and ask him a series of questions concerning alleged sales of squalene to petitioner, knowing that he was under indictment therefor and would refuse to testify on the ground that it might incriminate him.

A. Through the testimony of Dolke and Geller, the Government established that one, Memmoli, purchased squalene from Distillation between the years 1945 and 1947. Memmoli was then called as a witness by the Government, and he immediately disclosed the fact that he was under indictment in the United States District Court in Brooklyn, for allegedly selling squalene to claimant and consequently would refuse to answer any questions (R. 88, 89).* He was then asked whether he knew Geller, *Antonio Corrao* or Antonio Corrao Corporation and what business dealings, if any, he had with them (R. 89); whether he knew Mr. Dolke of Distillation and concerning any business dealings that he had with it involving *the purchase of squalene* (R. 91).

Memmoli was then specifically asked *whether he sold squalene to Antonio Corrao or Antonio Corrao Corporation at any time* (R. 91, 92). *The witness refused to answer any of the questions on constitutional grounds and his refusal to answer was sustained* (R. 91, 92).

*He was subsequently acquitted of the charge (R. 261).

Disclosure that Memmoli was under indictment, asking him the foregoing questions, the witness's refusal to answer on constitutional grounds, were highly prejudicial, since the inference that the jury would necessarily draw therefrom was that he *did sell* squalene to Corrao, which was added to claimant's oil herein, and was fearful lest such an answer would incriminate him in the pending indictment. *Coyne* v. *U. S.*, 246 Fed. 120; *Mitrovich* v. *U. S.*, 15 F. (2) 163. By reason of the foregoing, counsel for claimant moved for a mistrial, but the motion was denied (R. 92).

The Court below in its opinion stated (R. 254):

> "Nevertheless we are not prepared to say that it would not be ground for reversal if the party who called a witness connected with a challenged transaction knew, or had reasonable cause to know, before putting the witness on the stand that he would claim his privilege. *McClure* v. *State*, 251 S. W. 1099; *Rice* v. *State* 51, S. W. (2d) 364."

But, it is undisputed that the U. S. Attorney did know in advance of calling Memmoli that he would refuse to answer any questions. Indeed, after Memmoli was subpoenaed, his attorney called the U. S. Attorney on the telephone and told him that Memmoli would refuse to testify on constitutional grounds (R. 261). More, petitioner's counsel protested at the side bar that it was improper for the Government to call a witness who was under indictment and who would claim privilege, because such would have an evil effect against petitioner before the Jury (R. 261). None of the foregoing facts was denied by the U. S. Attorney in the court below.

The record further shows (R. 88, 89) that when Memmoli was called to the stand, he immediately disclosed that he was under indictment and would refuse to answer any

questions, but notwithstanding the foregoing, the U. S. Attorney persisted in asking a series of questions, which he knew the witness would, and did refuse to answer, and thereupon petitioner's counsel moved for a mistrial which was denied.

In its opinion, the Court below erroneously states that the questions were asked without protest on petitioner's part (R. 253) and that by its silence it helped to create a situation where reversible error resulted.* Moving for a mistrial while Memmoli was on the stand was not an act of acquiescence approving the impropriety. Instead, it boldly raised the question of prejudice and impugned the fairness of the trial and all that the Government's attorney was doing. The cases of *Morros* v. *U. S.*, 101 Fed. (2d) 654 and *Louisville R. Co.* v. *Masterson*, 96 S. W. 534, cited by the Court below to sustain its claim that there was acquiescence by petitioner are clearly distinguishable. In the first case, no objection was voiced by the defendant until *after* the jury had brought in a verdict, whereas in the second case the parties expressly waived the impropriety and agreed to continue the trial.

B. When summing up to the jury, the United States Attorney called attention to, and commented on the fact that Memmoli, his witness, had refused to answer the questions. This was wrong and constituted reversible error (*Beach* v. *U. S.*, 46 Fed. 754; *McClure* v. *State, supra*), because it in effect again asked the jury to infer that Memmoli's failure to answer was proof that Corrao had purchased squalene from him, and hence claimant was guilty as charged in this case; otherwise why should Memmoli be so reticent to testify. Consequently, counsel again moved for a mistrial, but the motion was denied (R. 163, 164).

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*The suggestion is also untenable because in any event the only one who may object to the questions and claim privilege against incrimination is the witness, not the attorney. *Ziegler* v. *U. S.*, 174 Fed. (2d) 439.

In its charge, the Court made a statement with reference to Memmoli's refusal to answer which was even more prejudicial to claimant's rights. It said (R. 171):

> "Memmoli, you recall, was called to testify and declined to testify on the ground that his testimony might incriminate him. * * * I am, however, *constrained* to implement that ruling by saying to you now that Memmoli's *confessed reluctance* to incriminate himself may not be used to incriminate others and does not constitute ground, independent ground, of unfavorable inference to the claimant."

The Court's comments that it was *"constrained"* to tell the jury that they might not use Memmoli's *"confessed reluctance to incriminate himself"* as a basis for drawing an unfavorable inference against claimant, was a refined, if not subtle way of saying, that the Court was indeed pained that it could not legally tell the jury "you may incriminate the claimant, it is guilty, because Memmoli has refused to testify." We submit that the circumstances herein outlined had an evil effect on the jury, doomed claimant's right to a fair trial and constitutes reversible error. *People* v. *Manning*, 278 N. Y. 40, 44.

III.

Incompetent proof was received and the evidence adduced was insufficient to establish the charge of adulteration and misbranding. It was error for the court below to refuse to dismiss the libels and/or remand the case to the District Court for a new trial when it was shown, without contradiction, that the Government suppressed from, and failed to disclose to the jury the fact that the tests employed by its chemists to prove the charges herein, were wholly inaccurate and inadequate.

A.

Dolke, Bassen, Geller and Ledder testified that in or about July 1947, one year prior to the offense charged herein, anthranilic acid was added to squalene at Distillation's premises in Rochester, which was sold to Circle Mop & Brush Co., Geller and one, Memmoli. No proof was adduced showing any connection or dealing whatever between claimant and Distillation, or Memmoli or Loumen Drug Co., or Geller or Circle Mop & Brush Co. On the contrary, the proof showed that at no time did claimant ever obtain, use or purchase squalene or adulterant from any one, and this proof is reinforced by the fact that when its premises were raided in June 1948 by Government agents, Russell and Williams, no squalene or adulterant was therein found. There being a complete lack of connection between the squalene which emanated in Rochester a year before and the claimant, the testimony of the foregoing witnesses should have been excluded and the receipt of such evidence constitutes reversible error.

B.

The Government seeks the forfeiture of claimant's goods by imposing one inference upon another, something

which is forbidden by law. It is *without* any direct or competent proof that squalene has been added to the oil, or that squalene purchased or obtained by Memmoli in Rochester, between July and October 1947, was sold or delivered by him to the claimant at any time thereafter. Instead, the Government's case is founded *solely* on inferences, one based upon the other, namely:

(1) that Memmoli sold or delivered squalene to the claimant and from such unsupported inference to infer the further inference;

(2) that such squalene was added to claimant's oil;

(3) from such additional unsupported inference to further infer that anthranilic acid allegedly found in claimant's oil in June 1948, is the *same* acid that was placed in certain squalene in the Distillation plant in Rochester in June 1947, even though anthranilic acid is a common chemical and like squalene has no marks of distinguishment or identification;

(4) and therefore to finally infer that claimant's Pace and Figlia Mia brands of oil do not contain 20% and 10% olive oil respectively.

The rule is elementary that a judgment may not be based on inferences resting upon other inferences. Thus, in *Rosenberg* v. *United States,* 120 Fed. (2d) 935 at 937, C. C. A. 10, 1941, it was said:

> "But an inference of fact which is essential to the establishment of the offense cannot be rested upon another inference. Conviction cannot be predicated upon one inference pyramided upon another. Presumption cannot be superimposed upon presumption and thus reach the ultimate conclusion of guilt."

The same rule has been followed in this Court, *U. S.* v. *Ross*, 92 U. S. 281, 283; *Pennsylvania R. R. Co.* v. *Chamberlain*, 288 U. S. 333; see also *Alexander* v. *Standard Accident Ins. Co.*, 122 Fed. (2d) 995, 997. The decision of the Court below is contrary to and violative of these authorities.

C.

The essence of the offense herein was that the Pace and Figlia Mia Brands did not contain 20% and 10% olive oil, respectively. Dr. Fitelson "interpreted" the various tests made by the Government chemists and based thereon concluded that the oil contained but one or two percent olive oil, and that squalene had been added thereto.* Thus the integrity of the tests employed by the Government chemists was of vital importance. Neither Fitelson nor the Government witnesses disclosed to the jury the fact that the tests employed by them were erroneous, inaccurate and incapable of determining the percentage of olive oil in the blends. Instead, they represented that the tests used were valid and could accurately gauge the amount of olive oil therein contained, and based upon such testimony the Jury arrived at its verdict that the blend did not contain the stated amount of olive oil.

It appears without contradiction that subsequent to the foregoing trial, claimant was indicted criminally in the United States District Court for the very same offense. Dr. Fitelson and the same Government witnesses testified at this later trial, and Dr. Fitelson admitted that none of the tests performed by the Government witnesses was accurate or adequate to determine the percentage of olive oil. Thus, he testified (R. 258-9):

> "Q. You admit that the chemistry of oil, insofar as it seeks to determine the amounts of olive oil in

*None of the Government chemists found that squalene had been added.

a given mixture, is not accurate? A. I will admit that.

Q. I think you testified that each and every one of the methods used to determine the percentage of the two oils in this mixture are in themselves inadequate and inaccurate and subject to error; is that right? A. That is essentially correct.

Q. Was there one admittedly accurate, scientific test that you performed on any of the samples to accurately determine the percentage of olive oil, yes or no? A. There is no test that might be called an accurate test, no."

Similarly, he admitted that the squalene test was utterly inaccurate (R. 258) and "in * * * a case such as this one * * * it does not tell you anything" (R. 258). Yet at the trial at bar he stated that the squalene test was a recognized test used to determine the percentage of olive oil in the blend of oil, all of which beguiled the Court below and induced it to accept his testimony concerning the authenticity of the test (R. 248).

Moreover, at the criminal trial it was further shown that the red color which allegedly indicated the presence of anthranilic acid (coal tar derivative) in claimant's oil, was produceable by many substances other than anthranilic acid and was neither a recognized nor a specific test for the detection of such acid (R. 261). Indeed, insecticides, used to spray olive trees contain coal tar derivatives and when the olives are crushed, the derivative will produce a red color, if phenol is added thereto.

What caused the Government witnesses at bar to conceal from the Jury the fact that the tests made herein were utterly inaccurate? It is obvious that if these material facts had not been suppressed, a different verdict would have resulted. The Court below upon being apprised of these facts should have reversed the judgment or remanded the case for a new trial.

IV.

It was a violation of due process to deny claimant (a) the right to properly defend itself and (b) discovery and inspection.

A.

When the proceedings were commenced in July 1948, no claim was made that squalene containing anthranilic acid had been added to the oil. On August 31, 1948, when claimant received the official samples herein, it made a test thereon to determine whether the respective brands contained twenty and ten percent. olive oil, free from artificial flavoring. *No other charge was then involved* (R. 183). In January 1949, long after the test had been completed and the Government's charge found to be without merit, petitioner moved for a discovery and inspection of the results of the analysis made by the Government on petitioner's oil, so that it might be advised of the exact nature of the Government's charge against it and not entrapped on the trial (R. 22-25), *U. S.* v. *300 cans of black raspberries,* 7 F. R. D. 36; rules 32, 33, 34 of Rules of Civil Procedure; *U. S.* v. *935 cans of tomato puree,* 136 Fed. (2d) 523.

Petitioner urged that it was completely uninformed concerning the nature of the Government's claim; that its own test of the oil revealed no adulteration or misbranding; and unless the Government were compelled to disclose the exact nature of the claim against petitioner as shown by the Government's own tests, it would be unable to properly defend itself on the trial. The statement by the Court below (R. 252) that claimant evidently anticipated that it would be charged with the addition of squalene before making the application is not borne out by, and indeed is negated by the record (see R. 22 to 25).

The trial Court denied claimant's motion (R. 189-192) because: "the claimant has had opportunity to make its own test and analysis which may be offered in evidence against a forfeiture." This ruling was erroneous and contrary to the holding in *U. S.* v. *300 cases of Black Raspberries, supra,* and the Court below admitted this (R. 251). The error and the serious prejudice that resulted to the claimant as a result of the Court's ruling soon manifested itself.

At the trial for the first time, the Government "sprung" the claim that there was a trace of anthranilic acid (coal tar derivative) in the oil. Claimant was utterly unprepared to meet this issue since it was not contained in the pleadings. Claimant's counsel was taken by surprise and protested his inability to meet the charge (R. 56 to 68, 63 to 66). But all protests were in vain.

The Court's reason for refusing the right to discovery and inspection herein on the alleged ground that the claimant had had an opportunity to make its own test, was wholly untenable, inasmuch as Dr. Fitelson testified that the test used by the Government herein was a *secret test, concerning which no one knew anything about* (R. 124, 125).

In *United States* v. *184 Barrels of Eggs,* 53 Fed. Supp. 652, at 656, the Court in condemning the Government's use of secret tests said:

> "The tests upon which the Government here relied were developed in secret. The experiments did not disclose the methods used in their tests or their conclusions either to the Association of Agricultural Chemists or to any other scientific society. Furthermore, they did not announce these tests or their conclusions to the industry. * * * It would have been only fair to all concerned for such tests and conclusions to have been disclosed to the industry so that an opportunity would have been afforded to verify them or to determine whether the arbitrary

limits stated by the defendant were proper conclusions to be drawn from the tests."

All of the foregoing indicates that the claimant was entitled to a discovery and inspection in advance of trial apprising it of the exact nature of the Government's claim, so that a secret test would not be "sprung" upon it, nor would it be engulfed by the guile of governmental agencies offering secret proof on matters not pleaded in the filed papers. *Hickman* v. *Taylor,* 329 U. S. 495, at 507:

> "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end either party may compel the other to disgorge whatever facts he has in his possession. The discovery procedure merely advances the stage at which the discovery can be compelled, from the time of the trial to the period preceding it, thus reducing the possibility of surprise."

V.

Each libel should have been dismissed since there was no proof that the official sample was representative of the goods contained in each shipment.

The shipments to the five consignees were made in *single gallon cans* as follows: Market Wholesale Grocers, 180 Gallons, Pace oil (R. 160); Bristol Quality Market, 96 Gallons, Pace Oil (R. 159, 160); Thomas Hirsack, 30 Gallons, Pace oil; International Importing Co., 30 Gallons, Pace oil; John Massimo & Sons, 30 Gallons Pace and 30 Gallons Figlia Mia oil (R. 160). The burden was on the Government to prove that the *single* official sample that it collected for analysis from each shipment was representative of such entire shipment, otherwise a decree of forfeiture was erroneously granted.

As already indicated, the shipment to Market Wholesale Grocers consisted of 180 one gallon cans of oil. On the trial, the Government's proof was limited to the contents of a *one* gallon can (the official sample) collected from this entire shipment. No proof was offered to show that the single sample was representative of the entire shipment. The taking of a one gallon can out of a total of 180 separate gallons is not proof that the one is representative of the whole. Nor would one gallon out of 96 gallon cans (Bristol Quality Market's shipment) be proof that such sample is representative of the whole. The same holds true concerning the other shipments involved herein.

"Representative" means that the sample corresponds to, and is like, or equivalent to the entire shipment, and this may be proved only by taking a *number* of samples at random from the *same shipment* and showing that their contents are identical. This the Government failed to do. In *United States* v. *935 Cases,* 65 Fed. Supp. 503, it was held that before an entire shipment may be condemned, it must be shown that *samples* therefrom were *"taken at wide random from the entire shipment."* See also *United States* v. *43½ Gross Rubber Prophylactics,* 65 Fed. Supp. 534, aff'd 159 Fed. (2d) 881. Since the Government failed to prove that the *single* official sample from each shipment was representative of the whole of such shipment, the motion to dismiss should have been granted.

The suggestion by the Court below (R. 249) that at times 8,600 gallons of oil were mixed simultaneously in claimant's factory, and consequently one gallon therefrom would be representative of the whole, is fallacious, since there is no proof that the oil involved in our shipments came therefrom. The Court below erroneously placed on claimant the burden of proving that our oil did not come from one "mix" when such was the task of the Government (R. 249).

The Court's Charge.

Under Section 372 (b) of the Food and Drug Act, it is provided:

> "Availability to Owner of Part of Analysis Samples:
>
> Where a sample of a food * * * is collected for analysis * * * the administrator shall, upon request provide a part of such *official sample* for examination or analysis by any person named on the label of the article or the owner thereof."

At bar, the claimant on August 31, 1948, made a written request to the Administrator for a portion of each official sample collected for analysis. Its attorney was furnished with one quart from each such sample (R. 183). The sample furnished was an "official sample", in contradistinction to a "representative sample" (R. 183) and was obtained by the claimant for the purpose of testing the oil, so as to be in a position to dispute the Government's analysis of the *official* sample.

The trial Court realized that a single gallon can collected from a large shipment was not representative of the whole. Because of this, it erroneously sought to, and did relieve the Government of its burden of proof in the case and instead placed the burden thereof on the claimant. When charging the jury, it said (R. 168, 169):

> "Now if the claimant had felt that the sample taken by the Government from each shipment was insufficient to constitute a fairly representative sample, so far as the evidence shows he could have asked for additional samples from the same shipment, and having obtained them, analyzed them, and if the samples disclosed any discrepancy with that taken by the Government, the discrepancy could have been called to our attention."

The law permits the owner to obtain a portion of the *official sample* collected by the Government, which is the basis upon which it seeks condemnation. This is in contradistinction to a *representative sample* which the Court by order may direct be furnished *to any party, including the Government,* Title 21, Section 334(c), Food and Drug Act. *At bar, the Government failed to obtain a representative sample of each shipment pursuant to such section.* Having failed to do so, or present any proof that the *official sample* was *representative* of the whole, it was error to place the burden of the Government's failure of proof on the claimant.

Furthermore, the Court told the jury that if the Government were obliged to produce more than one sample from each shipment in order to prove that the sample collected actually was representative of the entire shipment, it would be a burden to the Government and the trial of the case would be prolonged unduly (R. 169).

Assuming the burden of proof herein was difficult or would be made more difficult by collecting a proper number of official samples, nevertheless, it was the Government's duty to do so. Goods belonging to a citizen may not be confiscated by the sovereign, without substantial proof, upon the specious theory advanced by the Court that the presentation of adequate proof would be too burdensome.

IN CONCLUSION.

For the reasons herein stated, we respectfully submit that this petition for a Writ of Certiorari, should be granted.

Respectfully submitted,

CHESTER A. LESSLER,
Attorney for Petitioner-Claimant.

JULIUS ZIZMOR,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 708

5 CASES, MORE OR LESS, ETC.; ANTONIO CORRAO CORPORATION, CLAIMANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the district court on the petitioner's motion for discovery (R. 189-192) is reported at 9 F. R. D. 81. The opinion (R. 247-253) of the Court of Appeals is reported at 179 F. 2d 519.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1950 (R. 254). The petition for a writ of certiorari was filed on March 28,

1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error when it applied its order excluding witnesses from the courtroom, entered at the request of petitioner's counsel, to the corporate petitioner's president who had been subpoenaed as a Government witness.

2. Whether, in the circumstances of this case, the trial court committed reversible error in denying the request of petitioner's counsel that he be permitted to make an opening statement.

3. Whether the trial court committed reversible error in denying petitioner's motions for mistrial, arising out of the Government's calling a witness who claimed his privilege against self-incrimination and the prosecutor's comment, in summation, on that claim.

4. Whether the trial court committed reversible error in denying petitioner's pre-trial motion for discovery and inspection of the Government's chemical tests, analyses, and reports.

5. Whether the charges of adulteration and misbranding and the representative nature of the samples relied upon were sustained by competent evidence sufficient to justify submission of these factual issues to the jury.

6. Whether the Court of Appeals erred in denying petitioner's motion to remand the case to the district court for a new trial.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U.S.C. 301 *et seq.*, provides in pertinent part:

> SEC. 304 (a). Any article of food * * * that is adulterated or misbranded when introduced into or while in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned * * *. [21 U.S.C. 334 (a)]
>
> SEC. 304 (c). The court at any time after seizure up to a reasonable time before trial shall by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruits or fresh vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the package from which the samples analyzed were obtained. [21 U.S.C. 334 (c)]
>
> SEC. 304 (d). Any food * * * condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct * * *. [21 U.S.C. 334 (d)]
>
> SEC. 402. A food shall be deemed to be adulterated—* * * (b) (1) If any valuable con-

stituent has been in whole or in part omitted or abstracted therefrom; or * * * (4) if any substance has been added thereto or mixed or packed therewith so as to * * * make it appear better or of greater value than it is. [21 U.S.C. 342 (b)]

SEC. 403. A food shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular. [21 U.S.C. 343 (a)]

SEC. 702 (b). Where a sample of a food * * * is collected for analysis under this Act the Administrator shall, upon request, provide a part of such official sample for examination or analysis by any person named on the label of the article, or the owner thereof, or his attorney or agent; * * *. [21 U.S.C. 372 (b)]

STATEMENT

This case arises out of libel proceedings instituted by the United States under Section 304(a) of the Federal Food, Drug, and Cosmetic Act in the District Court for the District of Connecticut for the seizure and condemnation of five shipments of two brands of blended edible oil. One of the products, designated as Pace O Mio Dio Brand, purported to be 80 percent peanut oil and 20 percent pure olive oil. The other, designated as Figlia Mia Brand, purported to contain 90 percent vegetable oils and 10 percent pure olive oil. The libels of information alleged that the oils were adulterated within the meaning of Section

402(b)(1) of the Act in that a valuable constituent, olive oil, had been wholly or in part omitted therefrom, and within the meaning of Section 402(b)(4) in that artificial flavoring and squalene had been added thereto in order to make the oils appear to be or to contain substantial amounts of olive oil, which is better and of greater value than the oils contained in the products. The libels also charged that the oils were misbranded within the meaning of Section 403(a) in that the label statements, "20% pure olive oil" and "10% pure olive oil", were false and misleading as applied to products containing little, if any, olive oil. (R. 3-8.) Antonio Corrao Corporation appeared in the proceedings as claimant and filed an answer substantially in the form of a general denial (R. 9-15). The five actions were consolidated for trial (R. 19-20).

Expert testimony adduced by the Government showed that the squalene content of blended edible oils is universally used as a measure of the amount of olive oil present in a blend (R. 36, 37, 113-115, 142). Squalene is also present in shark liver oil. It is impossible to distinguish one squalene from the other. (R. 39, 40, 115, 153.) By adding shark liver oil squalene to peanut oil or to vegetable oil, it is possible to produce blends that appear in standard chemical tests to contain 10 percent or 20 percent olive oil, although actually they contain none or as little as 1 or 2 percent.

Learning that squalene was being added to blended oils to confound the chemical test for determining olive oil content, the Government devised a method for detecting added squalene (R. 124, 125, 212, 213).

The only possible commercial source of squalene obtained from shark liver oil was Distillation Products, Inc., of Rochester, New York (R. 209, 210). Agents of the Federal Food and Drug Administration went to this only known source and mixed a small amount of anthranilic acid, a chemical marker completely foreign to any edible oil or to squalene, into the last batch of squalene produced (R. 59, 106-107, 116, 211, 244). The chemically marked squalene was traced step by step from the time it left Distillation Products, Inc., until it reached one Louis Memmoli in Brooklyn, New York (R. 72-78, 80-83, 85-87, 93-95). On being questioned by inspectors Williams and Russell of the Food and Drug Administration at petitioner's plant on June 8 and 9, 1948, Corrao, petitioner's president and manager, first denied knowing Memmoli. Subsequently, however, he permitted the inspectors to examine his personal telephone and address book in which Memmoli's name, business address, and home and business telephone numbers were found. Confronted with this evidence, Corrao then admitted that he knew Memmoli, explaining that he had been misled by the agents' pronounciation of the name. (R. 235, 236, 239.) And at the trial, Corrao

admitted that he knew Memmoli well (R. 232).

During the inspection of petitioner's plant above referred to, the Food and Drug Administration inspectors found two 5,000 gallon mixing tanks containing a total of 8,600 gallons of oil in operation (R. 230-231). Shortly thereafter, interstate shipments of petitioner's oil were made, and Food and Drug inspectors selected sample cans from the shipments at random (R. 168).[1] Analysis of these samples revealed the presence of "marked" squalene in petitioner's oils (R. 55-60, 97-106).

The consolidated cases were tried before a jury, which returned a special verdict finding that the charges of adulteration and misbranding were true (R. 26-29). The District Court thereupon entered judgment condemning the five shipments (R. 19-21). The judgment was affirmed by the Court of Appeals for the Second Circuit (R. 254).

Thereafter, petitioner filed a motion in the Court of Appeals for an order staying the mandate and reversing the judgment of the District Court and/or remanding the case for a new trial (R. 255-264). The motion was denied (R. 264-265).

ARGUMENT

1. Petitioner's first complaint is that Corrao, its president, was excluded from the courtroom (Pet.

[1] The record before this Court, consisting of appendices prepared by each party, is somewhat abbreviated. But the fact of shipment, as found by the jury (R. 26) is not disputed, nor is it disputed that the selections were made at random.

13-16). But that situation was of petitioner's own making. The record reveals that a motion to exclude all witnesses was made and pressed by petitioner's counsel (R. 32). Over the Government's objection (R. 32), the district court granted petitioner's motion and directed that witnesses be excluded until they testified (R. 33). Government counsel then noted Corrao's presence in the courtroom despite the fact that he was "being subpoenaed as a witness by the Government", and the the court ruled that since the exclusion order must be "applied equally to all witnesses" (R. 67) Corrao fell within it (R. 33-35).

In so ruling, the district court did not commit reversible error. As the Court of Appeals pointed out (R. 250), the universal rule in the federal courts is that the sequestration of witnesses lies within the discretion of the trial judge. There was no abuse of that discretion. "It is apparent that the danger of an attempt to falsify testimony and the utility of sequestration to expose it are most emphatic for *a party* who is a prospective witness." 6 Wigmore, *Evidence* (3d ed.), p. 364 (italics supplied). And the countervailing considerations against exclusion in the case of a party have less force here since Corrao was not a party; the corporation was. *Kentucky Union Lumber Co.'s Assignee, &c.* v. *Abney,* 17 Ky. L. Rep. 401 (chief officer of corporate party properly excluded). This circumstance, taken in connection with the district

court's ruling that there is "no objection to your defendant having any advisers in court that are desired, so long as they are not also witnesses" (R. 50) brings Corrao's exclusion within the area of the trial court's permissible discretion.

District of Columbia v. *Flagg*, 42 App. D. C. 73, 76, the only federal court decision relied upon by petitioner (Pet. 14), is not to the contrary. The *holding* of the court in that case was that it was error to disqualify a witness who had disobeyed the trial court's order of exclusion. The question of disqualification, of course, is a problem distinct from that at bar.

2. It was also within the trial judge's discretion to deny petitioner's counsel's request that he be permitted to make an opening statement after Government counsel had waived such a statement (R. 30-31; see Pet. 16-17). While there are statutes in some states which expressly provide a right to make an opening statement, there is no such rule in the federal courts, and it is universally recognized that all matters touching the orderly conduct of the trial are within the sound discretion of the trial court. The same measure of discretion should be allowed as to the need for opening statements. As the Court of Appeals observed (R. 250), the issues to be tried were simple and had been explained by the trial judge on the voir dire examination of the jurors (R. 245-246). An opening statement by counsel would have been merely a restatement of

matter already covered by the court. Counsel at no time made any attempt to show the necessity for an explanatory statement even though, under the trial court's ruling, he was free to do so. For, with respect to the question of an opening statement, the trial court said (R. 31-32): "I think I would prefer, Mr. Zizmor, to feel our way, and if we get into areas in which the drift of the evidence is not apparent, we can then explain it as we go along." And petitioner's counsel was, of course, accorded the fullest opportunity to explain his theory of the case in his closing argument to the jury.

3. The district court did not commit reversible error in denying petitioner's motions for mistrial arising out of the witness Memmoli's claim of privilege (cf. Pet. 17-20). After it had been established by other witnesses that a quantity of squalene had been ordered by Memmoli and delivered to him (R. 72-74, 75-78, 81, 83), Memmoli was called as a witness by the Government (R. 88). He immediately stated that he refused to testify on the ground that his testimony might incriminate him, particularly in connection with a certain criminal case then pending against him in the United States District Court for the Eastern District of New York. The court advised him that the pending question as to his occupation was not incriminating, but that the court would keep his statement in mind. (R. 88-89.) Thereafter, the court sustained Memmoli's claim of privilege in refusing to answer a series of specific

questions, not objected to by petitioner, concerning his acquaintance and dealings, if any, with Corrao and Distillation Products, Inc. (R. 89-92). Only after the Government had completed its examination (R. 92) did petitioner move for a mistrial upon the ground that "the propounded questions and refusal of the witness to answer are prejudicial to the rights of my client." R. 92). Petitioner's present assertion that it was reversible error to call Memmoli as a witness and interrogate him because the Government knew that he was under indictment and would claim his privilege (Pet. 17-20) is based entirely upon allegations to that effect in its motion, filed in the Court of Appeals after entry of the judgment of affirmance, to remand the cause for a new trial (R. 261-262). (See *infra,* pp. 14-15.

There is nothing in the record of the proceedings in the trial court to indicate that the United States attorney acted in bad faith in calling Memmoli to the witness stand. See *infra,* pp. 14-15. Furthermore, after Memmoli claimed his privilege, petitioner was aware that he would not answer further questions. Nevertheless, it made no objection or protest of any kind to several pointed questions which were asked of the witness and which the witness refused to answer. Not until after the Government had completed its examination and the alleged prejudice which petitioner complains of had been accomplished was there any objection (R. 92). The Court of Appeals was therefore right in hold-

ing that there was no error in denying the motion for a mistrial, for as the court stated (R. 253): "The victim of alleged prejudice cannot be allowed to nurse it along to the point of reversibility and then take advantage of a situation which by his silence he has helped to create." If, as is indicated in the motion filed in the Court of Appeals (R. 261) and the petition for certiorari (p. 18), petitioner had prior knowledge of Memmoli's intended refusal to testify, it was incumbent upon petitioner to object to the interrogation on that ground.

Petitioner's further complaint (Pet. 19-20) against Government counsel's reference, in his argument to the jury, to Memmoli's refusal to answer questions (R. 163) is without merit. It is, of course, evident that the jurors were well aware of the fact that Memmoli had refused to testify. Nevertheless, the trial court specifically instructed the jury that Memmoli's refusal did not constitute ground for any unfavorable inference against petitioner, and that "the situation, then, is just as though Memmoli had never been called" (R. 171). Even in a criminal case, comment by the prosecutor upon the defendant's refusal to testify is cured by an appropriate instruction. *United States* v. *De Vasto,* 52 F. 2d 26 (C.A. 2), certiorari denied, 284 U. S. 678; *Morris* v. *United States,* 61 F. 2d 520 (C.A. D.C.), certiorari denied, 287 U.S. 597; *United States* v. *Di Carlo,* 64 F. 2d 15 (C.A. 2). Certainly, a similar instruction should cure such

error as may possibly arise from a comment on the refusal of a witness in a civil case against a corporation.

4. Little need be added to the opinion of the district court (R. 189-192) and that of the Court of Appeals (R. 251-252), rejecting petitioner's claim that it was entitled to pre-trial discovery of copies of Government tests, analyses, and chemical reports (Pet. 25-27). Before trial, petitioner had made its own tests and asserted, as the only ground for discovery, its fear that it might be "entrapped" at trial (R. 25). That is not such a showing of "good cause" as is required by Rule 34 of the Rules of Civil Procedure. Although petitioner now insists that its fears were realized (Pet. 26), the alleged "entrapment" never concerned petitioner sufficiently to induce him even to seek a continuance to enable him to meet the "new" evidence (R. 252). A need not felt at trial certainly does not constitute good cause before trial. In any event, petitioner is completely unable to show that the error, if any, in denying pre-trial discovery was not, or could not have been, cured at trial if petitioner had been as conscious of prejudice then as it seems now to be, and had taken appropriate steps to protect itself against the injury which, as an afterthought, it now asserts.

5. The competency and sufficiency of the evidence, on the issues of adulteration, misbranding,

and the representative character of the samples, are questions obviously peculiar to this case and wholly inappropriate bases for certiorari. The Statement, *supra,* pp. 4-7, reveals that the evidence was more than sufficient to go to the jury, and the jury was correctly instructed that the Government had the burden of proof on these issues (R. 165).

6. After the court below had affirmed the decree of the district court (R. 254), petitioner moved it to remand the cause for a new trial (R. 255-263). Petitioner sought such disposition on two grounds: it asserted (a) that government counsel had known in advance that Memmoli would refuse to answer any questions (see *supra,* pp. 10-12), and (b) that expert government witnesses had contradicted themselves in crucial respects at a subsequent trial in another district of petitioner and its president on criminal charges.[2]

(a) The assertion that the Government was forewarned of Memmoli's claim of privilege was made only after the Court of Appeals had indicated, in its opinion, that it had grave doubts as to the propriety of calling a witness whom a party knows will claim his privilege, and after the court had dismissed those doubts in this case with the observation that there was no showing that Government counsel "knew or had reasonable cause to know that

[2] We are advised that both defendants were found guilty.

Memmoli would claim the privilege when he took the stand" (R. 252-253). The record of the proceedings in the trial court does not show any discussion at side bar as was alleged in the motion (R. 261; see also Pet. 18) or that the judge was aware of the pending indictment against Memmoli and the possibility of an objection to calling him as a witness.

In these circumstances, an appellate court may not properly be called upon to withdraw a previously entered decree because of matter not brought to the attention of the trial court. Rule 60 (b) of the Federal Rules of Civil Procedure provides ample means for reopening a judgment and there is no justification for ignoring its provisions, under which claims such as are made by petitioner can be tried out in an orderly fashion. A Court of Appeals cannot ordinarily conduct a *de novo* hearing to ascertain the truth of allegations such as were made by petitioner, and it would have been highly improper for the Court of Appeals to order a new trial on *ex parte* representations.

(b) What has just been said disposes also of petitioner's complaint, made after judgment in the Court of Appeals, that contradictory testimony by expert witnesses for the Government in the criminal case indicated that, in this case, they had failed to disclose pertinent facts (R. 257-261). On the face of petitioner's charge, moreover, its real grievance seems to be that the witnesses in question were sub-

jected to less searching cross-examination by petitioner in this case than in the criminal case. In fact, so far as this record discloses, there is no lack of substantial consistency between the testimony of Fitelson [3] in this case and the alleged excerpts from his testimony at the criminal trial which are quoted in the motion filed in the Court of Appeals (compare R. 37, 114-119, 142-143, 206-213 with R. 257-259 and Pet. 23-24).

CONCLUSION

The decision of the court below is correct and there is no conflict. Consequently, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.
ROBERT S. ERDAHL,
VINCENT A. KLEINFELD,
JOHN T. GRIGSBY,
Attorneys.
EDWARD K. ADELSHEIM,
Attorney, Federal Security Agency.

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[3] He is singled out here only because it is his testimony of which the petitioner complains in this Court (Pet. 23-24).

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